

Draft recommendation to the European Commission in complaint 1351/2000/ADB

Recommendation

Case 1351/2000/IJH - Opened on 24/11/2000 - Recommendation on 04/12/2001 - Decision on 25/11/2002

(Made in accordance with Article 3 (6) of the Statute of the European Ombudsman (1))

SUMMARY

The complaint in this case concerns the Commission's refusal to pay a beneficiary of a joint venture support scheme (Joint Venture Programme Phare - "JOP Phare") the agreed funds. On 13 June 2000, the Commission's services carried out an audit on the complainant's company. The audit has not yet been finalised. Incidentally, the complaint concerns the Commission's refusal to return the complainant a ledger taken during the audit. During the present inquiry the complainant also alleged that his company was registered on a black list.

The Commission argues that the audit could not be finalised because of the complainant's failure to provide the necessary documents. Furthermore, the ledger taken during the audit was not an original one. Finally, the complainant was not registered on a black list but on the Commission's internal Early Warning System (EWS).

From the evidence at hand, the Ombudsman takes the view that the Commission has not adequately informed the complainant of the documents he had to provide to enable the Commission to finalise the audit and to make a timely decision as regards the payment of the funds. Furthermore, the Ombudsman considers that the Commission has not provided him with a reasonable explanation for its refusal to return the ledger. Finally, the Ombudsman trusts that the Commission that it will reconsider the registration of the complainant's company on the EWS in view of the results of the audit.

In these circumstances, the Ombudsman makes a draft recommendation. He asks the Commission to inform the complainant of the documents he is supposed to provide for the audit and to return the ledger.

THE COMPLAINT



The complainant is the executive director of GERE; a Company registered in Luxembourg. GERE applied for EU funds under JOP Facility 2 programme. According to the application procedure, the request had to be made through a Financial Intermediary (FI). According to the complainant the Commission accepted the project in October 1998. In August 1999, supporting documents were forwarded to the Commission through the FI, and the Company expected to be paid within 60 days. The Commission, through the FI again, requested further information on several occasions. It seems that none of the information provided satisfied the Commission and it therefore decided to carry out an audit on the company. This was done on 13 June 2000. By the end of October 2000 the company had not been paid and despite several contacts with the Commission, it was neither informed of the audit's outcome, nor was it sent back some original documents the Commission took from it during the audit.

The complainant therefore decided to lodge a complaint against the European Commission and made the following allegations:

1. The contractual situation of companies applying for JOP funds vis-à-vis the Commission is unclear. Although GERE never signed a contract with the Commission it is imposed obligations by the Commission.
2. The way information is circulated is counterproductive. The relations between GERE and the Commission were mostly conducted through the FI. It is therefore unclear whether the complainant was asked to provide the information the Commission really needed.
3. When carrying out its controls, the Commission should have limited its investigations to elements linked to the funded project without controlling the company's whole business accounting.
4. GERE has never been informed of the results of the audit carried out on 13 June 2000.
5. The Commission refused to return original documents it was given for the purpose of the aforementioned audit.

The complainant claimed payment of the funds and the return of the original documents the Commission was entrusted with.

THE INQUIRY

The European Commission's opinion

The opinion of the European Commission on the complaint was in summary the following:

1. The Commission and the FI signed a Framework Agreement (FA) on 18 January 1996. For each project a Specific Agreement (SA) is signed between the Commission and the FI. The latter, in turn, signs a Financing Agreement (FinA) with the beneficiary of the funds. In GERE's case, the SA and FinA were signed on 26 October 1998. The FinA specifically referred to the FA and the SA. Both of these contain provisions creating obligations for the beneficiary towards



the Commission. The complainant could therefore not claim to be unaware of the situation and of his obligations towards the Commission.

2. In principle all the contacts with beneficiaries go through the FI, the Commission does not consider this as counterproductive. On the contrary, this offers potential beneficiaries throughout Europe the possibility to benefit from the assistance of experienced professionals. In the present case, the problems seem to originate in the relations between the FI and the complainant.

3. The FinA refers to provisions of the FA and SA entitling the Commission to carry out "...any and all controls...". The controls carried out aimed at ascertaining that GERE was eligible for the financing and at controlling the funded action itself. This required having access to all the files of the company.

4. On 13 June 2000, the Commission's auditors informed GERE of provisional conclusions. However the beneficiary was asked to provide additional supporting documents before the finalisation of the audit. One of the declarations sent by the complainant's lawyer on 16 August 2000 was not satisfactory. Since then, the Commission has been trying to obtain an adequate document from the person who issued the declaration. The complainant never complied with its obligations, the adequate supporting documents were never provided, they could therefore not be approved and consequently the funds not be paid.

5. The ledger (*Grand Livre*) in possession of the Commission is dated 13 June 2000, the day of the audit, and was printed by GERE's bookkeeper at the request of the auditors. The accounts for the year 1999 were transmitted to GERE by its accountant on 13 April 2000; therefore, the original ledger had necessarily been prepared before that date. Finally the Commission offered the complainant's lawyer the possibility to inspect the documents the Commission holds. This opportunity was never used.

The complainant's observations

The European Ombudsman forwarded the European Commission's opinion to the complainant with an invitation to make observations. In his reply, the complainant in summary stated the following:

1. Despite its requests, GERE was never disclosed copies or allowed to consult the FA and SA by the FI. Although these documents are mentioned as annexes to the FinA, GERE never saw them. The Commission had been informed of this situation. However, GERE accepts its own responsibility on this point.

2. This kind of contract with references to other contracts involving third parties is confusing. Contrary to the Commission's expectations, the complainant does not consider the FI in question to be a highly qualified professional. GERE could have hoped for a better monitoring of the file and considers that the Commission should monitor the activities of the Financial Intermediaries.

3. GERE was never opposed to an audit. However, the technical and financial reports were



provided on 5 August 1999. Since then, GERE has never received any written comment or payment by the Commission. Although, according to good administrative practice, all the additional information could have been asked for in writing, either by the Commission directly or by the FI, GERE was asked for information orally and on several isolated occasions. Moreover, these requests were only made when GERE queried about the progress of the file.

4. GERE did not receive any written conclusions or provisional conclusions on the audit. Written requests for information by the Commission were consecutive to GERE's written requests regarding the return of its ledger. Although GERE repeatedly asked the Commission for the results of the audit and the payment of the funds, the complainant is still unaware of the Commission's reasons for not finalising the audit.

5. The complainant considers that it is not up to the Commission to decide whether the document that was provided is an original or not. In fact, each time the ledger is printed it is invoiced to GERE. Yet, each company established in Luxembourg has to keep a ledger in its premises. The Commission's refusal to return the ledger costs GERE at least 100 €.

Finally, the complainant regrets that all the consequences of the flaws in this project are to be borne by the weakest party, i.e. GERE. Although GERE was not informed of all the terms of the contract it never refused to collaborate. The complainant regrets that for GERE, the verdict came before the judgement and that it was put on a black list.

Further inquiries

On 2 May 2001, the complainant provided the Ombudsman with evidence regarding the inscription of GERE on a Commission black list. The complainant had received a fax sent by the Joint Research Centre (JRC) of the European Commission in Ispra informing him that a payment to be made for another project was blocked because GERE appeared on "*the black list of the E.U.*".

After careful consideration of this new element, it appeared that further inquiries were necessary. The Ombudsman therefore asked the Commission to inform him whether the Commission blocked payments to be made to GERE under undisputed contracts. Furthermore, the Ombudsman queried about the operation of the black list mentioned by a Commission official.

The Commission regretted the wording used by one of its officials to mention its internal Early Warning System (EWS) set up further to the European Parliament's request. The EWS aims at identifying beneficiaries of Community funds who committed administrative errors or frauds. The EWS does not stop a payment; it only makes it more difficult and requests further checking by the responsible services. In GERE's case regrettable delays occurred. In July, the Commission apologised for it and paid the amounts owed under the undisputed project as well as delayed interests.

The complainant held that GERE had never been informed of any fraud or administrative error which would have motivated its registration on the EWS. The complainant maintains that Commission officials commonly designate the EWS as a black list and that its effect is to block



payments. Furthermore if the EWS was not a black list, it should not be handled as such and the registered companies should be informed in writing.

THE DECISION

1 Alleged unclear contractual situation vis-à-vis the Commission

1.1 The complainant considered that the contractual situation of companies applying for JOP funds vis-à-vis the Commission is unclear. GERE never signed a contract with the Commission and is imposed obligations by it.

1.2 The Commission argued that the complainant could not be unaware of its contractual obligations towards the Commission. All the provisions were clearly set out in the Financing Agreement and in the Framework and Specific Agreements attached to it.

1.3 The Ombudsman notes that the complainant considers that the FI did not properly inform GERE of all the contractual provisions applicable to the Financing Agreement. The complainant also admitted its own responsibility on this aspect of the case. GERE appears to have entered a contract without getting acquainted with the annexes to this contract, which contained provisions creating obligations vis-à-vis the Commission. The Ombudsman therefore considers that there is no evidence of maladministration by the Commission as regards this aspect of the case.

2 Circulation of information between GERE and the Commission

2.1 The complainant considered that the way information was circulated was counterproductive. The relations between GERE and the Commission were mostly conducted through the FI. It is therefore unclear whether the complainant was asked to provide the information the Commission really needed.

2.2 The Commission argued that using a FI guarantees that the file is dealt with by an experienced professional.

2.3 The Ombudsman notes that there is no evidence in the file that the system of using Financial Intermediaries as such is to blame for the difficulties in the relations between GERE and the Commission. Both the Commission and the complainant seem to attribute part of the responsibility for the flaws in the circulation of information to the FI. The Ombudsman therefore concludes that there is no evidence of maladministration by the Commission as regards this aspect of the case.

3 Extent of the audit

3.1 The complainant held that, when carrying out the audit, the Commission should have limited its investigations to elements linked to the funded project without controlling the company's whole business accounting.

3.2 The Commission argued that the extent of the audit accorded with GERE's contractual obligations.

3.3 In view of the contractual provisions, particularly in view of the relevant Framework



Agreement, the Commission does not appear to have exceeded its powers when carrying out the audit of GERE. The Ombudsman therefore concludes that there is no instance of maladministration as regards this aspect of the case.

4 Failure to inform GERE of the results of the audit

4.1 According to the complainant GERE has never been informed of the results of the audit carried out on 13 June 2000.

4.2 The Commission held that the Commission's auditors informed GERE of provisional conclusions on 13 June 2000. However the beneficiary was asked to provide additional supporting documents before the finalisation of the audit. Despite repeated requests, the complainant never complied with its obligations, these documents were never provided, they could therefore not be approved and consequently the funds not be paid.

4.3 The Ombudsman notes, that from the documents at hand, the Commission does not appear to have made the complainant aware of the documents he is supposed to provide in order not to delay the Commission's decision as regards the payment of the funds. This could constitute an instance of maladministration and the Ombudsman will therefore make a draft recommendation in accordance with Article 3(6) of the Statute of the Ombudsman.

5 Refusal to return original documents taken during the audit

5.1 The complainant alleged that the Commission refused to return original documents it was given for the purpose of the aforementioned audit.

5.2 The Commission argued that the ledger, which was given by GERE to the auditors and which is kept by the Commission's services, is not an original document. It was printed on the day of the audit.

5.3 The Ombudsman understands that the Commission since 13 June 2000, and up to date, is using GERE's ledger for the year 1999 for control purposes. Although the document was printed especially for the audit, the complainant alleges that his company was charged a significant fee for the reissue of this document. The complainant therefore asked to be returned the ledger, which he considers to be GERE's property.

5.4 The Commission has not provided the Ombudsman with a reasonable explanation for its refusal to continue its work on a photocopy of the ledger and to return GERE the document printed on 13 June 2000. The Ombudsman will therefore make a draft recommendation in accordance with Article 3(6) of the Statute of the Ombudsman.

6 Alleged registration of GERE on a black list and its consequences

6.1 The complainant alleged that GERE appeared on a black list of the Commission. This blocked all the payments to be made to GERE by the Commission even under undisputed contracts.

6.2 The Commission explained that the payments were delayed because of the Commission's internal Early Warning System. This system requires further checking before making payments to beneficiaries who are registered on the EWS because of administrative errors or frauds. In the present case, GERE was registered on the EWS because of the difficulties in relation with



the contract signed in the framework of the JOP project.

6.3 The Ombudsman notes that during the present inquiry the payments to be made to GERE under undisputed contracts could be made. The Commission has provided the Ombudsman with a reasonable explanation as regards the reasons for registering GERE on the EWS. The Ombudsman has therefore concluded that there is no evidence of maladministration as regards this aspect of the case.

6.4 The Ombudsman notes that some Commission officials appear to consider the EWS as a black list, although the Commission has stated that it is not. The Ombudsman may therefore consider at a later date, investigating the general operation of the EWS in an own initiative inquiry.

7 Conclusion

The Ombudsman considers that the Commission's approach in the present case gave rise to instances of maladministration. The Ombudsman therefore makes the following draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman:

The draft recommendation

The Commission should inform the complainant in writing of the documents he is supposed to provide to enable the Commission to make a decision on the payment within a reasonable time limit. Furthermore, the Commission should return the complainant GERE's ledger for 1999 printed on 13 June 2000.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion before 28 February 2002. The detailed opinion could consist of the acceptance of the Ombudsman's draft recommendation and a description of how it has been implemented.

Jacob SÖDERMAN

Strasbourg, 4 December 2001

(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113/15.